88-1911

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH R. COSENTINO, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. Where an indictment charges petitioner with participating in a scheme to defraud a governmental agency and others of intangible rights and also intertwines a charge that petitioner also participated in a scheme to defraud a related person of money, and after proof closes, the judge, in a bench trial, makes it clear and announces that his verdict is based upon the intangible right of deprivation, enters judgment thereon, does the trial court have jurisdiction, after appeal is prosecuted and the cause is remanded to determine the effect of *McNally v. United States* on the judgment, to repudiate his prior findings, conclusions, and then to modify the judgment to find petitioner guilty of the money fraud the court rejected prior to judgment?

B. If upon an indictment with intertwined charges the trial court professes to have entered a general finding of guilty on all counts, upon which he has entered judgment, and the Supreme Court declares, thereafter, that two of the charges do not constitute an offense, is petitioner entitled to a reversal upon appeal, and at the least, a new trial?

C. Where petitioner has been subjected to trial upon three intertwined charges of three separate offenses, the trial court's findings establish that petitioner has been adjudged guilty upon a charge declared to state no offense and the Court of Appeals returns the case for a determination of the effect of the decisions voiding the two charges, if the court thereafter declares

petitioner guilty of one of the charges originally rejected by the court, has petitioner been twice put in jeopardy of his liberty in violation of the Constitution?

D. In an indictment and trial where there was no charge or proof introduced that any policyholder, claimant, or creditor of an insurance company sustained a monetary injury due to any activities it was caused to engage in by the defendants charged with injuring it and the proof establishes that the only injured person is one of the defendants who was its sole shareholder, in complete control and its president, while simultaneously leading the defendants in their efforts to save the company involved, and the only injury alleged to any person, other than the controlled corporation, is an intangible rights injury, can that corporation be used to impose criminal liability for injury to it under the mail fraud statute, or, does the imposition of liability establish that the corporate fiction is being used to circumvent the decision in *McNally v. United States*?

E. If the presumption of innocence is rejected, the tripartite subdivision of our federal government eroded, the foundation of our federal system rejected, ultimately causing petitioner to be found guilty upon a record barren of evidence he "intended" to participate in a fraud and upon a charge not levied against him, should his conviction stand?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OFFICIAL AND UNOFFICIAL REPORTS INVOLVED	1
BASIS OF JURISDICTION	2
CONSTITUTIONAL RULES AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
A.	
PETITIONER IS BEING DEPRIVED OF HIS LIBERTY UNDER A VOID JUDGMENT IN VIOLATION OF THE CONSTITUTION AND THIS COURT'S DECISIONS	10
B.	
PETITIONER HAS TWICE BEEN PLACED IN JEOPARDY OF HIS LIBERTY IN VIOLATION OF U.S. CONST., AMEND. V	18
C.	
THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF ANY SCHEME TO DEFRAUD ANY PERSON, OR CLASS OF PERSONS, OF ANY MONEY OR PROPERTY ..	19

D.

A DEFENDANT IS "INNOCENT UNTIL PROVEN GUILTY"—REJECTED; OUR FEDERAL SYSTEM OF GOVERNMENT—REJECTED; THE TRIPARTITE SUBDIVISION OF OUR FEDERAL GOVERNMENT—REJECTED, IN THIS CASE FINISHING WITH A CONVICTION UPON A RECORD TOTALLY DEVOID OF EVIDENTIARY SUPPORT ON A MAJOR ELEMENT CHARGED AND FOR A CRIME NOT CHARGED 23

CONCLUSION 28

APPENDIX ..... Separate Volume

TABLE OF AUTHORITIES

Cases PAGE

Alabama Power Co. v. Ickes, 302 U.S. 464 (1938) . 20

Bender v. Williamsport Area School District, ___ U.S. ___, 106 S. Ct. 1326 (1986) 17, 21

Bowen v. Johnston, 306 U.S. 19 (1938) 12, 14, 16

Brown v. United States, 716 F.2d 457 (CA. 7, 1983) 16

Carpenter v. United States, ___ U.S. ___, 108 S. Ct. 316 (1987) 22

Cesario v. United States, 200 F.2d 232 (CA. 1, 1952) 16

Cole v. Arkansas, 333 U.S. 196 (1948) 27

Davis v. United States, 417 U.S. 333 (1974) ... 12

Dorfman v. Gerber, 29 Ill.2d 191 (1963) 26

Durland v. United States, 161 U.S. 306 (1895) .. 25, 26

Federated Department Stores, Inc. v. Moeite et al., 452 U.S. 394 (1981) 14, 15

Green v. United States, 355 U.S. 184 (1957) ... 18, 19

Griggsy v. Provident Consumers Discount Company, 459 U.S. 56 (1982) 14

Grimes v. United States, 607 F.2d 6 (CA. 2, 1979) . 15

Heflin v. United States, 385 U.S. 415 (1959) .. 14

In Re Fidelity Assurance Association, 42 F. Supp. 973 (W.D. W.Va. 1941) 21

In Re Nielsen, 131 U.S. 176 (1889) 12, 14

Insurance Corp. v. Compaigne Des Bauxites, 456 U.S. 694 (1982) 12

Kaufman v. United States, 394 U.S. 217 (1969) .. 14

Marbury v. Madison, 1 Crunch. (5 US) 137 (1803) . 12

McNally v. Hill, 293 U.S. 131 (1934) 15

McNally v. United States, 483 U.S. 350, 107 S. Ct. 2875 (1987) ..... *passim*

Parr v. United States, 363 U.S. 370 (1960) 26

Pennoyer v. Neff, 95 U.S. 733 (1877) 18

Phillips v. United States, 356 F.2d 297 (1966) ... 24, 25

Rodriguez v. United States, 395 U.S. 327 (1969) .. 14

Rutherford v. United States, 806 F.2d 1455 (CA. 10, 1986) 14

Smith v. Fitzsimmons, 264 F. Supp. 728 (S.D.N.Y. 1967), *aff'd*, 394 F.2d 381 (CA. 2), *cert. denied*, 393 U.S. 939 (1968) 15

Snow v. United States, 484 F.2d 811 (D.C. App. Div. 1973) 16

Stone v. Powell, 428 U.S. 465 (1978) 14

Stromberg v. California, 283 U.S. 359 (1931) 16

Thompson v. Louisville, 362 U.S. 199 (1960) .. 27

United States v. Addonizio, 442 U.S. 178 (1979) . 14, 15

United States v. Bags of Flower, 12 U.S. 398 (1804) 21

United States v. Bailey, 859 F.2d 1265 (CA. 7, 1988) 17

United States v. Baranski, 484 F.2d 556 (CA. 7, 1973) 17

United States v. Beacher Construction Co., Inc., 729 F.2d 1278 (CA. 10, 1984) 19

United States v. Carmen, 577 F.2d 556 (CA. 9, 1978) 16

United States v. Davis, 417 U.S. 333 (1974) ... 12

United States v. Ewell, 383 U.S. 116 (1965) ... 19

United States v. Feldman, 711 F.2d 758 (CA. 7, 1983) 17

United States v. Figuera, 337 F. Supp. 645 (S.D. N.Y. 1971) 15

United States v. Goodwin & Hudson, 7 Crunch. 32, 3 L.Ed. 259 (1812) 27

United States v. Head, 641 F.2d 174 (CA. 7, 1981) . 16, 17

United States v. Kastenbaum, 613 F.2d 86 (CA. 5, 1980) 15

United States v. Klein, 515 F.2d 751 (CA. 3, 1975) 24

United States v. Martin-Trigona, 684 F.2d 485 (CA. 7, 1982) 25

United States v. Peipgrass, 425 F.2d 194 (CA. 3, 1970) 24

United States v. Pearlstein, 576 F.2d 531 (CA. 3, 1978) 24

United States v. Sobel, 314 F.2d 314 (CA. 2, 1963), *cert. denied*, 374 U.S. 857 (1965) 15

United States v. Wellman, 830 F.2d 1453 (CA. 7, 1987) 17

Williams v. North Carolina, 317 U.S. 287 (1942) . 16

Wilson v. United States, 250 F.2d 312 (CA. 9, 1958) 16

Constitutional Provisions and Statutes

U.S. Const. Amend. V ..... *passim*

Title 18 U.S.C., sec. 1341 (as amend. 1970) . 2, 3, 12, 20

Title 18 U.S.C., sec. 1961 (1970) 20

Title 18 U.S.C., sec. 3231 (1949) 2, 3, 12

Title 28 U.S.C., sec. 1254(1) (1949) 3

Title 28 U.S.C., sec. 1291 (1949) 2

Title 28 U.S.C., sec. 1294 (1949) 2

Title 28 U.S.C., sec. 2106 (1949) 2, 3, 13

Title 28 U.S.C., sec. 2241 (as amend. 1966) 3, 14

Title 28 U.S.C., sec. 2255 (1948) 2, 3, 14

Title 18 U.S.C., Rule 23(c) (1949) 15

Other Authorities

Black's Law Dictionary, 5th Edition 20, 21

Presumed Innocent, Scott Turow (Farrar, Straus, Girout 1987) 26

Warren, *Some New Light on the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 73 (1923) . 27

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To the Honorable Chief Justices and the Associate Justices of the Supreme Court of the United States, your petitioner, Joseph R. Cosentino, Sr., by his counsel, Mitchell H. Caplan, respectfully represents that:

OFFICIAL AND UNOFFICIAL REPORTS INVOLVED

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit are as yet unpublished. Both the judgment and the opinion are printed in the Appendix separately filed herewith, Judgment, p. B-1; Opinion, p. A-1.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division denying petitioner's application for relief pursuant to Title 28 U.S.C., sec. 2255 is unpublished. A copy is printed in the Appendix at p. D-1.

The judgment entered by the District Court on December 4, 1986 is unpublished; it is printed in the Appendix, p. E-1.

The oral verdict and explanation of the District Court upon which he rendered judgment is not published but is printed at p. F-1 of the Appendix.

BASIS OF JURISDICTION

The indictment in this case charged an offense under Title 18 U.S.C., sec. 1341 (as amend. 1970) within the district and division of the United States District Court for the Northern District of Illinois, Eastern Division whose jurisdiction was founded upon Title 18 U.S.C., sec. 3231 (1949).

Final judgment in the District Court was rendered on December 4, 1986. Appeal was taken on December 14, 1986 to the United States Court of Appeals for the Seventh Circuit whose jurisdiction was founded upon Title 28 U.S.C., sec. 1291 and Title 28 U.S.C., sec. 1294.

The Court of Appeals remanded the cause to the District Court to determine the effect, if any, of *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987) on the cause. Jurisdiction to remand was founded upon Title 28 U.S.C., sec. 2106. Thereafter, the cause was returned to the Court of Appeals whose jurisdiction remained founded upon Title 28 U.S.C., sec. 1291.

The United States Court of Appeals affirmed the judgment on February 8, 1989 and denied petitioner's rehearing on March 22, 1989. This Court's jurisdiction is founded upon Title 28 U.S.C., sec. 1254(1).

CONSTITUTIONAL RULES AND STATUTES INVOLVED

The following provisions, statutes, court rules, and constitutional provisions are involved:

U.S. Const., Amend. V
Title 18 U.S.C., sec. 1341 (as amend. 1970)
Title 28 U.S.C., sec. 2106 (1949)
Title 28 U.S.C., sec. 2241 (as amend. 1966)
Title 28 U.S.C., sec. 2255 (1948)

The aforesaid constitutional rules and statutory provisions are lengthy and are therefore printed in the Appendix.

STATEMENT OF THE CASE

The indictment in this case was returned in the Northern District of Illinois, Eastern Division on September 6, 1986 charging petitioner and his co-defendants with an offense under Title 18 U.S.C., sec. 1341 (as amend. 1970) (mail fraud) in that district and division. The Court's jurisdiction was based upon Title 18 U.S.C., sec. 3231.

Paragraphs 10. a. 1 and 10. a. 2 of the indictment charged the defendants with having participated in a scheme to de-

fraud the policyholders and claimants of Kenilworth Insurance Company (hereinafter referred to as Kenilworth) of those fiduciary duties the defendants owed them, through the use of the mails (App. pp. G-1 to G-3).

Paragraph 10. b. charged petitioner and his co-defendants with participating with the use of the mails in a scheme to defraud the Illinois Department of Insurance (hereinafter referred to as the Department) by preventing its right to regulate the insurance industry in Illinois for the benefit of the public, and for the benefit of Kenilworth's claimants and policyholders (App. p. G-3).

Paragraph 10. c. charged the defendants with having participated in a scheme to use the mails "to obtain money by means of false and fraudulent pretenses and representations" (App. p. G-3). Paragraph 26 alleged that the basis of the scheme was "(to) operate Kenilworth for the purpose of . . . improperly converting insurance . . . premiums" (App. p. G-6).

Petitioner, a licensed insurance broker for some twenty-five years, specialized in surety contracts, knowing practically nothing of other insurance fields. His co-defendants were:

1. Chester Mitchell, Kenilworth's president, its sole shareholder and that person who was in complete control of it and of its activities. In addition, Mitchell was not only a participant in the joint venture which became involved in the case but in reality its leader.
2. Jack Geopfert, supposedly a commercial casualty insurance expert who did produce a great deal of premium business for Kenilworth and a reinsurance treaty that reinsured Kenilworth 100% against loss on policies issued and covered by the treaty.
3. Robert Patterson, who was a Kenilworth agent. He, together with his wife, owned a dormant insurance corporation we will call Robco which he, by oral

agreement of all defendants, dedicated to the production of commercial insurance premium for the benefit of Kenilworth. Mitchell permitted Robco to act as an agent without a contract in order to secure Kenilworth premium from commercial insurance policy sales, a new business for it, in an effort to bring Kenilworth out of its financial skid produced by the "cut throat" nature of its primary business automobile casualty. While Mitchell controlled all of Kenilworth's activities, including those defendants participated in, because he controlled Kenilworth's allowing or withdrawing permission to represent it, Patterson controlled Robco, including its money receipts and the distribution of that money.

In addition to the above evidence adduced at the trial, the prosecution also introduced evidence that:

a. Before the defendants joined together in their attempt to save Kenilworth, petitioner, at Mitchell's urging, arrived at an oral purchase agreement with one Milton Law to purchase all of his stock in Kenilworth for $250,000. Shortly after the venture here began, that oral agreement was reduced to writing, $50,000 paid down and $200,000 due by December 1, 1981. The written contract was not reported to the Department.

Petitioner was financially unable to complete the contract, and it was taken over by Mitchell who did complete it, sought and obtained Department approval of that purchase. Petitioner never had physical possession or control of the stock and was never a director, employee, or agent of Kenilworth. He was an agent for his wife's insurance agency who in turn was an agent of Kenilworth for surety, and he, for that agency, produced about $75,000 per month in premium for Kenilworth without concomitant loss.

b. Petitioner brought the defendants together because Mitchell wanted to bring Kenilworth into the commercial

insurance business. Geopfert produced the reinsurance treaty that made it feasible for Kenilworth to write sizeable amounts of such insurance.

c. Kenilworth had neither the staff nor expertise to handle such business or its production, nor, did it have the physical facility to do so. That's why Patterson's Robco was used. Between Geopfert and his employees and Patterson and his employees, there was sufficient people and knowledge to handle the business which began in September 1981.

d. By November 28, 1981, substantial premium had been produced for Kenilworth and substantial commissions earned, yet, the parties had no agreement among them on how to share wealth. They met on that day and agreed upon a weekly draw and how profits emanating from earned commission would be distributed. It was decided that each—petitioner, Geopfert, Mitchell, and Patterson—would receive at present $2,000 per week. Each designed a nominee to receive their checks.

Geopfert testified that he warned the parties that he and his employee, Alan Assael, had both been convicted of felonies.

The agreement reached that day also provided that:

> "Mitchell's stock shall be purchased annually by taking 20% of the 50% profit until he has received $4,000,000."

This was not reported to the Department.

Geopfert also suggested that Kenilworth enter into a Managing General Agency (MGA) agreement with Robco in order to allow it to control the flow of cash and creation of liability in Kenilworth. Nothing was agreed upon.

e. On January 10, 1982, an MGA was entered into between Robco and Kenilworth. Petitioner was not consulted

on its terms, nor, was he told the terms. Petitioner never participated in any of Robco's activities and had no interest in it except as a joint venturer of profits.

The MGA agreement gave Robco a 30% commission—20% to be paid to producers, 10% to cover its work. It assumed a tremendous amount of both paperwork and administrative work for Kenilworth. The reporting features were different, but absent knowledge that the Department required a different reporting of financial condition than the statute demanded for Kenilworth—something petitioner knew nothing of—there was nothing unusual about it given the amount of business being produced.

The contract required all premium—for commercial insurance—to flow through Robco. However, that never happened because almost immediately Mitchell made an imperative non-refusable demand upon Patterson that all premium be paid directly to Kenilworth. Mitchell did, however, agree that Kenilworth would pay the producers and remit 10% of all premium to Robco—premium Robco was producing—because Robco's expenses and costs, except for producers, was not changed by the premium flow.

Kenilworth never remitted the 10%, yet, Robco's expenses continued, including the check to the joint venturers. Mitchell instructed Patterson to pay all necessary money out of those moneys Robco was holding that stemmed from Kenilworth premium collected and that at the end of the accounting period, they would straighten it all out. Patterson did that.

f. During the entire period the enterprise lasted, September 1981 to April 1982, the following is a recapitulation of the income:

1. Kenilworth wrote $13,000,000 plus in auto insurance which the parties had nothing to do with;

2. Robco produced $3,998,000 in premium for Kenilworth which Kenilworth received directly;

3. Robco received $285,000 in premium out of which it paid $57,000 to producers, $20,300 to Kenilworth, leaving it with $203,000. It was entitled, because it had produced the money, to $423,000. It, therefore, was owed $220,000. Patterson had paid out $112,000 to the defendants and the remainder to expenses. All checks to the defendants being issued in the names of their nominees. Petitioner's wife received $31,000 in checks directly from Robco signed by Patterson. Petitioner believed the money so received was profits generated by commissions earned, and he had no reason to suspect otherwise because of both Patterson and Mitchell's knowledge and expertise (Record, pp. 691-692, 705, cross by gov't).

Upon the close of proof, when summation arguments were made, defense counsel in the course of his argument began to address the charge of obtaining money under false and fraudulent pretenses and representations, when the court interrupted saying:

> "THE COURT: I don't think the government has even argued that fraud. . . So I think for purposes of this argument, you do not have to go through that."

This ended the argument. Indeed, the court was correct (Record, pp. 809-810, 822-823, 851).

On October 1, 1986, the court reached a verdict. After detailing defendants concealments which deprived the Department of its regulatory function, the court concluded:

> "The victims in this case are the . . . Department . . . which, because of the concealments, were estopped from performing the type of effective regulation . . . (it) was required to perform . . . as well as the policyholders who were deprived of that regulation. . . For these reasons there will be a finding of guilty. . ."

(App. p. F-3).

Judgment, including incarceration, community services, and probation was entered on December 4, 1986 (App. p. E-1). Notice of Appeal was filed on December 14, 1986.

On September 11, 1987, pursuant to a motion filed by the defendants, while appeal was pending, after this Court's decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), the Court of Appeals remanded the cause to the District Court to:

> "(determine) . . . the effect, if any, of *United States v. McNally*. . ."

(Motion, App. p. H-1; Order, App. p. J-1).

Thereafter, defendants filed their "Motion to Vacate Judgment and Sentence. . ." (App. p. I-1).

On May 28, 1988, after reviewing the evidence adduced at the trial, the District Court rendered a Memorandum Opinion and Order denying defendants' motion by:

1. Repudiating his oral statement of findings and conclusions because he did not "intend" them as findings and conclusions;
2. Determining that the remand vested in him jurisdiction to redetermine the facts and arrive at new conclusions; and,
3. Basing his new conclusions on the fact that:

   "Although this Court . . . concluded that defendants had deprived the . . . Department of its intangible right to be . . . informed and that the policyholders were in turn deprived of that regulation, it also concludes that Kenilworth . . . was a victim . . . when its premiums . . . were unlawfully withdrawn and disbursed. . . The indictment in this case properly charge(d) defendant(s) . . . with . . . (this) scheme . . . (t)he Government argued this scheme at trial and presented ample evidence at trial. The court . . . (at trial) found that . . . (defendants) . . . participated in

> a scheme to misappropriate . . . premiums, and that Kenilworth was . . . a victim. . ."

(App. pp. D-12, D-13).

The case then returned to the Court of Appeals who affirmed the judgment based wholly on the May 28, 1988 Memorandum Opinion and Order, indeed, adopting the findings and language of that opinion and order over all legal and factual objections raised (App. p. A-1).[1]

REASONS FOR GRANTING THE WRIT

A.

PETITIONER IS BEING DEPRIVED OF HIS LIBERTY UNDER A VOID JUDGMENT IN VIOLATION OF THE CONSTITUTION AND THIS COURT'S DECISIONS.

Paragraphs 10. a. 1 and 10. a. 2 of the indictment charged petitioner with participating in a scheme to defraud Kenilworth's policyholders and claimants of certain fiduciary duties owed to them.

Paragraph 10. b of the indictment charged petitioner with participating in a scheme to defraud the Department of its right to regulate the insurance industry for the public, Kenilworth's policyholders and claimants.

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[1] The original title of the case and the original parties were: United States of America, plaintiff vs. Chester Mitchell, Jr., Robert H. Patterson, Joseph R. Cosentino, Sr. (petitioner), Jack V. Geopfert, and Willard Hayne, United States District Court, Northern District, Illinois, Eastern Division, case number 86 CR 350. While the indictment was twenty-three counts, only eight are here involved. In addition, the defendant Hayne was never involved in the eight counts. The defendants Mitchell and Geopfert plead guilty, petitioner and Patterson waived trial by jury and submitted to a bench trial.

Paragraph 10. c, read with paragraph 26, charged petitioner with a scheme to defraud Kenilworth of money.

The government pressed its case on the intangible rights deprivation as epitomized by some of its argument on summation that:

> "(T)he victims of the scheme to defraud being . . . the . . . Department . . . because they are deprived of their right to regulate . . . but also, the policyholders . . . because they . . . are deprived of the regulation of the . . . Department. . ."

and, finally:

> "(T)he essence of the scheme to defraud, the fraud on the Department. . ."

This emphasis on the intangible rights charges impressed the District Court because when defense counsel began to argue that there was no evidence to support the property deprivation charge, the court interrupted him saying:

> "I don't think the government . . . argued that fraud . . . so I think for purposes of this argument you do not have to go through that."

The government did not dispell that conclusion. This view of the case climaxed on October 1, 1986 with the Court announcing its verdict. After detailing those concealments, which in his opinion prevented the Department from regulating, the court concluded:

> "The victims in this case are the . . . Department . . . which, because of the concealments, were estopped from performing the type of effective regulation that . . . (it) was required to perform . . . as well as the policyholders, who were deprived of that regulation. . ."
>
> * * *
>
> "It is not conceivable that . . . (the defendants) did not . . . know of . . . the fraud that was being perpetrated on the . . . Department . . . and the policyholders. . ."

Accordingly, on December 4, 1986, a judgment of guilty on Counts 1 through 8 was entered. Appeal was prosecuted, and during the pendency of that appeal, this Court handed down its decision in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987) determining that the mail fraud statute does not encompass within its ambit a deprivation of an "intangible right."

The District Court sitting in this case is a court of limited jurisdiction, deriving its jurisdiction from U.S. Const., Art. III and the congressional enabling act, *Marbury v. Madison*, 1 Crunch. (5 US) 137, 173-180 (1803); *Insurance Corp. v. Compaigne Des Bauxites*, 456 U.S. 694 (1982). Congress vested the District Court with jurisdiction over federal offenses, Title 18 U.S.C., sec. 3231, and a deprivation of an intangible right is not an offense under Title 18 U.S.C., sec. 1341, *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), hence, a conviction upon such a charge is void because the court lacked jurisdiction, *In Re Nielsen*, 131 U.S. 176, 182 (1889); *Bowen v. Johnston*, 306 U.S. 19, 23-24 (1938); *United States v. Davis*, 417 U.S. 333 (1974).

Defendants moved the Court of Appeals for an order remanding the cause to the trial court for an investigation into the effect, if any, *McNally* had on the judgment involved; the court entered an order "that the district court shall . . . (make) a determination of the effect, if any, of . . . *McNally*. . .". Hereafter, the defendants filed a "Motion to Vacate Judgment and Sentence. . ." before the district court.

The district court proceeded to review all of the evidence adduced before it at the trial, and then to reassess what it had said both in final argument and at the time of verdict, and concluded that:

> "(O)ne of the goals of defendants' scheme was to misappropriate Kenilworth . . . premiums. Although this Court also concluded that defendants had deprived

> the . . . Department of its intangible right to be fully informed and that the policy holders were in turn deprived of that regulation, it also concludes that Kenilworth . . . was a victim of this scheme when its premiums, which were held in trust by Robco, were unlawfully withdrawn and disbursed in furtherance of this scheme. . ."
>
> "The indictment in this case properly charges defendant(s) . . . with a scheme to defraud Kenilworth . . . of its premiums. The Government argued this scheme at trial and presented ample evidence at trial. The court also found that . . . (defendants) had indeed participated in a scheme to misappropriate . . . premiums, and that Kenilworth was indeed a victim of this scheme in that it was defrauded of its insurance premiums held in trust by Robco."

Defendant's motion was denied. The court revealed its rationale for reconvicting petitioner when it said:

> "(Defendants) pull out of context some comments this Court made during his attorney's closing argument and in delivering its finding of guilty and contends this proves that this court did not find defendants had conspired to defraud Kenilworth of a property interest. Under Fed.R.Crim.P. 23(c), the court need only make a general finding, and only upon request, find the facts specifically. There was no request by either party . . . (t)heretofore, this Court gave a general finding of guilt and did not intend that its 'very brief remarks' should have been taken as a special finding. Because there appears to be no time limit under Fed. R.Crim.P. 23(c) as to findings issued by the judge, this Court sets forth the following findings. . .'

The remand in this case was not made pursuant to the initial clause of Title 28 U.S.C., sec. 2106, based upon the Court of Appeals having affected the judgment, but, rather, upon that sentence of 2106 which "require(d) such further proceedings to be had as may be just under the circumstances."

The court was now required to delve into whether its judgment was entered with jurisdiction or without jurisdiction. *That was its only duty, Rutherford v. United States*, 806 F.2d 1455 (CA. 10, 1986). The statutory basis to test jurisdiction in a federal court rests upon Title 28 U.S.C., sec. 2241 (habeas corpus) or the now more expeditious remedy provided in Title 28 U.S.C., sec. 2255; where jurisdiction is concerned, both statutory remedies and the decisions rendered under them are interchangeable, *Kaufman v. United States*, 394 U.S. 217, 222 (1969). The proceeding before the court was based upon those statutes, *cf. Rodriguez v. United States*, 395 U.S. 327, 331 (1969).

The court's jurisdiction was now very limited—to test jurisdiction only, *In Re Nielsen*, 131 U.S. 176, 182 (1889); *Bowen v. Johnston*, 306 U.S. 19, 23-24 (1938); *Stone v. Powell*, 428 U.S. 465, 474-475 (1978).

The proceeding was not a continuation of the former criminal case but an independent civil suit collaterally attacking the judgment, *Heflin v. United States*, 385 U.S. 415, 418 (1959). The filing of the notice of appeal had divested the trial court of jurisdiction to affect the judgment, *Griggsy v. Provident Consumers Discount Company*, 459 U.S. 56, 58 (1982) and the judgment was itself res judicata, which also divested the trial court of jurisdiction to affect it, permitting correction of errors only by the Court of Appeals, *Federated Department Stores, Inc. v. Moeite, et al.*, 452 U.S. 394, 398 (1981).

The rationale of the restrictions on jurisdiction to test jurisdiction i.e. collateral attack, are based upon the logic that while litigation begins, it must also end, and the sovereign, the public, and the courts are best served by bringing it to an end, *Federated Department Stores, Inc. v. Moeite, et al.*, 452 U.S. 394, 401-402 (1981); *United States v. Addonizio*, 442 U.S. 178, 184-186 (1979) (see par-

ticularly cases cited in n.11, p. 186).) Not only does it encourage finality, but it prevents hindsight from affecting the trial, and, thus, the adversary system as well, *United States v. Sobel*, 314 F.2d 314 (CA. 2, 1963), *cert. denied*, 374 U.S. 857 (1965).

The corollary to these principles is that the district court could not affect the judgment, indeed, the trial court record was frozen, *cf. Federated Department Stores, Inc. v. Moeite, et al.*, 452 U.S. 394 (1981); *Grimes v. United States*, 607 F.2d 6 (CA. 2, 1979). Petitioner's guilt or innocence were not at issue, *United States v. Kastenbaum*, 613 F.2d 86 (CA. 5, 1950). Error committed in the original trial were not at issue and could not be corrected, *United States v. Addozinio*, 442 U.S. 178, 184 (1979); *United States v. Sobel*, 314 F.2d 314 (CA. 2, 1963), *cert. denied*, 374 U.S. 857 (1964). Nor, could the district court *modify, revamp, or in any way correct the original judgment*, *McNally v. Hill*, 293 U.S. 131, 139 (1934); *Smith v. Fitzsimmons*, 264 F.Supp. 728 (S.D. N.Y. 1967), *aff'd*, 394 F.2d 381 (CA. 2), *cert. denied*, 393 U.S. 939 (1968).

The district court had no authority to inquire into the facts to determine if additional liability attached; the district court had no jurisdiction to make new findings and reach new conclusions, so that, in effect, the judgment was modified.

The court attempted to "hedge"—he didn't intend his remarks as findings and he wasn't requested to make the findings, hence, he may repudiate what he said.

While it is true that Title 18 U.S.C., Rule 23(c) states that findings only become mandatory if requested, yet, the courts have recognized that they have the right on their own initiative to make such findings, *e.g., United States v. Figuera*, 337 F.Supp. 645 (S.D. N.Y. 1971) and the circuits have implicitly approved of this procedure

where the trial court sees its need, *Snow v. United States*, 484 F.2d 811 (D.C. App. Div. 1973). Indeed, appellate courts have at times chided the trial courts for their failure to do so on their own initiative, *e.g.*, *Brown v. United States*, 716 F.2d 457 (CA. 7, 1983) (sentence vacated returned to court for findings).

Thus, there is nothing untoward about such findings. The efficacy of findings by the trial court is lodged in its beneficial effect when appellate review is called into play, *Snow v. United States*, 484 F.2d 811 (D.C. App. Div. 1973). Moreover, it protects the defendant's constitutional rights because it allows him to apprise the legal questions involved, as well as the facts at issue, *Cesario v. United States*, 200 F.2d 232, 233 (CA. 1, 1952); *Wilson v. United States*, 250 F.2d 312, 325 (CA. 9, 1958). It has the effect of explaining what the defendant has been found guilty of and also avoids resort to new trials resting upon general verdicts as they are viewed in multi-charged indictment under *Stromberg v. California*, 283 U.S. 359 (1931).

Indeed, petitioner in this case contended that if the trial court was correct—he had rendered a general finding of guilt—then it became impossible for the trier of fact to know whether the conviction rested upon the "intangible right" deprivation or the money allegation, and petitioner was entitled to a reversal. The Court of Appeals rejected that, basing their decision on the premises that the same evidence necessary to convict for one offense was necessary to convict for the other, hence, the "intangible rights" offense allegations were mere "surplusage".

This is a continuation of their philosophy, arrived at since *McNally*, that *Stromberg v. California*, 283 U.S. 359 (1931) and the cases that followed it, *e.g.*, *Williams v. North Carolina*, 317 U.S. 287, 291-292 (1942); *United States v. Carmen*, 577 F.2d 556 (CA. 9, 1978); *United States v.*

Head, 641 F.2d 174 (CA. 7, 1981) should be avoided, apparently to accomplish their social antipathy to those who are really guilty of the intangible rights crime. *Compare*, *United States v. Baranski*, 484 F.2d 556 (CA. 7, 1973); *United States v. Feldman*, 711 F.2d 758 (CA. 7, 1983) *with* *United States v. Wellman*, 830 F.2d 1453 (CA. 7, 1987); *United States v. Bailey*, 859 F.2d 1265 (CA. 7, 1988).

The approach is a narrow view of what *Stromberg* cured. That case recognizes the inherent unfairness of intermeshing two charges in an atmosphere where one or both will affect the jury's social perception. In this day and age when the news media give equal play to "white collar" crimes, as they do to crimes of violence, where insurance companies' rates and actions are bludgeoned and the brunt of consumer group action, referendum, and legislation, it seems hardly likely that a group of untrained lay persons would not be affected by a charge of broken fiduciary duty, prevention of Department regulation—the trained fact trier in this case was.

The refusal, therefore, to apply the rationale of *Stromberg* leaves wide open that basis type of unfairness which erodes constitutional guarantees.

Logic here dictates that the district court found petitioner guilty of mail fraud based upon a deprivation of intangible rights, which is not a mail fraud offense; hence, his judgment is void, and petitioner is entitled to release.

The Circuit Court of Appeals should have immediately discerned that the district court had no jurisdiction to amend its judgment and sua sponte reversed, *Bender v. Williamsport Area School District*, ____ U.S. ____, 106 S.Ct. 1326, 1331-1332 (1986).

Affirming the action in this case has a four-fold effect:

1. It now sets a precedent for review and modification by trial courts seriously affecting judgment final-

ity, heretofore, prohibited by this court and every other circuit;

2. It vitiates the beneficial effect of a sua sponte use of Title 18 U.S.C., Rule 23(c) while also permitting the use of "hindsight" in arriving at disposition of judicial events;

3. It will inhibit the use of both Section 2241 and 2255 relief, which itself is an aid to the appellate process, because prisoners will have to take a chance that an arguable right that now exists is turned around by an overweening desire to sustain one's prior decisions. Moreover, it is only a stone's throw to a new sentence; and,

4. It allows petitioner to be incarcerated under a void judgment simultaneously depriving him of his liberty without due process of law, *cf. Pennoyer v. Neff*, 95 U.S. 733 (1877).

Affirmance has an additional effect.

B.

PETITIONER HAS TWICE BEEN PLACED IN JEOPARDY OF HIS LIBERTY IN VIOLATION OF U.S. CONST. AMEND. V.

Petitioner was charged with three mail fraud offenses. The district court found him guilty of depriving the Illinois Department of Insurance of their right to regulate the insurance industry for the benefit of the public and Kenilworth policyholders.

However, he had also been charged with participating in a scheme to deprive Kenilworth of money. The trial court made no decision, either of guilt or innocence, on that charge, but petitioner was in direct peril of being convicted and punished on that charge. Under these circumstances, the failure to make any finding constituted an "implicit acquittal" of that charge, *Green v. United States*, 355 U.S. 184, 190 (1957).

When the case was returned to the trial court, not upon a remand for a new trial, that court proceeded to again place petitioner in peril of conviction and punishment of the charge of which he already stood "implicitly acquit(ted)" in violation of U.S. Const. Amend. V, *Green v. United States*, 355 U.S. 184 (1957); *United States v. Ewell*, 383 U.S. 116 (1965); *United States v. Beacher Construction Co., Inc.*, 729 F.2d 1278, 1282-1284 (CA. 10, 1984).

This constitutional deprivation is a direct outgrowth of the district court's improper view of its jurisdiction on remand and of the failure of the Court of Appeals to discern the error. Only action from this Court will not only cure the constitutional deprivation but also prevent future such decisions.

C.

THE GOVERNMENT FAILED TO PROVE THE EXISTENCE OF ANY SCHEME TO DEFRAUD ANY PERSON, OR CLASS OF PERSONS, OF ANY MONEY OR PROPERTY.

The district court, upon remand, found that:

> "(I)t was a scheme of the defendants to utilize and operate *Kenilworth* for the purpose of . . . converting to their own use *Kenilworth* . . . premium. . . (A) goal of this scheme was to deprive *Kenilworth* of more than . . . intangible right(s). . . Moreover, the proof at the trial adequately established that a goal of the scheme was to siphon off premium money from *Kenilworth*." (emphasis added)

The Court of Appeals mirrored this sentiment when it said:

> "(I)n the case before us, the scheme to deprive *Kenilworth* and its policyholders and claimants of their (right to fiduciary duties of defendants) was also the

> scheme that deprived *Kenilworth* of sound financial management. The two schemes are one and the same, and both allege conduct prohibited by the mail fraud statute—conduct that bled *Kenilworth* of needed money. . . (I)n misleading the . . . Department . . . the scheme permitted the agency . . . that additional time . . . (to allow) the defendants more time to take *Kenilworth* money from the *Robco* accounts." (emphasis added)

Let us look at undisputable fact. No allegation was made here, or, proof introduced, that any creditor of, claimant of, policyholder of, or the general public was deprived of any property by the events that took place in this case.

The only victim of the amended judgment was "Kenilworth." While Title 18 U.S.C., sec. 1341 does not deal with "persons" but with "mailings," it seems obvious that the victim is conceived of as being a "person," either as an individual or as a member of the public. In this case, the court, after remand, designated "Kenilworth" as that "person."

Kenilworth is a corporation, therefore, it is a "person" only because the legislature has created that fiction, *Black's Law Dictionary*, 5th Ed. p. 1023; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478-479 (1938).

Now, who was Kenilworth? Mitchell owned all of Kenilworth's stock; Mitchell was its president, Mitchell was in full control of all of its activities; and, Mitchell, when its demise came, was the only loser. It seems far fetched to us that if there must be a deprivation of property, it is possible to treat Kenilworth and Mitchell as separate "persons."

The separation, too, is a fiction; yet, it is avoided where the fiction either does harm or is unreal, *e.g.*, Title 18 U.S.C., sec. 1961 *et seq.* (RICO). The fiction, both as to a corporation being a person and as to its separation from

control, has a useful purpose in the financial world, allowing flexibility of monetary liability exposure to allow a multitude of actions which could not otherwise be taken.

However, as Justice Story, in a dissenting opinion, opined long ago in *United States v. Bags of Flower*, 12 U.S. 398, 405 (1804): "It seeks to be a rule founded on common sense, as well as strict justice, that fictions of the law shall not be permitted to work any wrong. . . ," indeed, the courts realize that "(A)ll such . . . fictions originate from necessity. Its use is limited to those cases in which it is necessary that the doctrine be invoked to accomplish some beneficial result. . . ," Judge Moore in *In Re Fidelity Assurance Association*, 42 F.Supp. 973, 984 (W.D. W.Va. 1941).

Moreover, *injuria absque damno*, which *Black's Law Dictionary*, 5th Ed. p. 706 defines as "A wrong done from which no loss or damage results and which, therefore, will not sustain an action," seems appropriate also.

Kenilworth suffered no loss; Mitchell did. In turn, Mitchell was the "leader" of the entire enterprise, and being the only one injured, this Court's recent holding in *Bender v. Williamsport Area School District*, ____ U.S. ____, 106 S.Ct. 1326, 1331 (1986) that:

> " '(A)t an irreducable minimum, Art. III requires the party who invokes the court's authority to show that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . The requirement of 'actual injury redressable by the court' . . . serves several of the implicit policies embodied in Article III. . . (I)t assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some but not all the facts of the case actually decided by the court.' "

seems appropriate, especially when combined with the use of a "fiction" to arrive at a result.

The public was not injured monetarily, no creditor was deprived of money, no claimant was deprived of money, no policyholder was deprived of money. Kenilworth, a "thing," didn't suffer because only its shareholders could suffer. Then who was injured? No one, so long as property deprivation must be proven.

The government appointed themselves guardian ad litem to the fictitious person, Kenilworth, and suddenly the court accepted this in order to give aid and comfort to the Department. The Department was the loser of its "intangible right," the court found, except that this Court knocked that into a "cocked hat." So now, let's use an alternative theory to achieve the same result.

If this prevails, then there is no doubt that overzealous prosecutors can and will create more "fictions" and vault those "fictions" into pretended injury and the limitation placed on mail fraud indictment proliferation by this Court's holding in *McNally*, which had to be followed by *Carpenter v. United States*, ____ U.S. ____, 108 S.Ct. 316 (1987) to emphasize the reality of the holding, will have gone for naught.

Not only this, but, that "fiction" will create harm, where none exists, again creating litigation unneeded.

It can be halted, but only by this Court's action.

D.

A DEFENDANT IS "INNOCENT UNTIL PROVEN GUILTY"—REJECTED; OUR FEDERAL SYSTEM OF GOVERNMENT—REJECTED; THE TRIPARTITE SUBDIVISION OF OUR FEDERAL GOVERNMENT—REJECTED, IN THIS CASE FINISHING WITH A CONVICTION UPON A RECORD TOTALLY DEVOID OF EVIDENTIARY SUPPORT ON A MAJOR ELEMENT CHARGED AND FOR A CRIME NOT CHARGED.

Mail fraud requires proof of two specific intentional acts: here, the "intent" to participate in a scheme to receive misappropriated Kenilworth premium and "intent" to use the mails. The mails were intentionally used. The indictment alleged that:

> "It was . . . a part of the scheme that . . . Patterson improperly converted premium money . . . (of) Kenilworth by distributing . . . (that) money to defendants . . . (petitioner). . . ,"

and the district court found this true; this was affirmed by the Court of Appeals.

The finding is based upon the trial court's perception that:

> "(A)ny unlawful withdraw(al) from a premium trust account is a misappropriation of insurance company funds. . . All withdrawals in excess of Robco's 30% commissions on insurance *it wrote* were misappropriations of Kenilworth premium."

There are some undisputed facts which must be brought to this Court's attention. First, Kenilworth produced no commercial insurance premium itself; second, all such premium, under the MGA, was to flow through Robco, and it was on this premium that Robco was entitled to 30%; third, Robco only received $285,000 directly, and the court was quite right it was entitled to $85,500 on those receipts; fourth, Kenilworth received $3,998,000 in premium

directly, premium received because Robco sold the policies. On this premium, by demand of Mitchell, it was only entitled to receive 10% or $398,000, which it never received; fifth, after deducting the $85,500 from the $285,000 directly and some $20,300 it sent to Kenilworth, it had $179,000 left. *It is this $179,000 which produced the controversy.*[2] What the court meant by "Robco's 30% commissions on insurance it wrote. . ." is a non-sequitar because it wrote all commercial insurance.

The controversy occurred because Kenilworth didn't remit Robco's "commissions." Mitchell and Patterson discussed this, and once again, the undisputed evidence reveals that *Mitchell told Patterson to use the funds in his hands until the end of the first accounting period when they'd straighten it out—that period never came.*

The Court must be apprised of one more undisputed fact—all witnesses testified that they expected to receive their money out of Robco's profits generated from earned commissions—anything other than that would be an act of insanity, and no one here was accused of being mentally ill. Based upon that, it required, if in fact the Court was right on the misappropriation, knowledge on the participants' part or suspicion so strong that knowledge could be implied, *United States v. Peipgrass*, 425 F.2d 194, 199 (CA. 3, 1970); *United States v. Klein*, 515 F.2d 751 (CA. 3, 1975); *Phillips v. United States*, 356 F.2d 297, 303 (CA. 9, 1966); *United States v. Pearlstein*, 576 F.2d 531, 537, 541 (CA. 3, 1978) evidence would have to be introduced in

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[2] Robco was entitled to 30% because it paid 20% to producers, leaving it 10% to pay for issuing the policy and handling adjusting. When Mitchell demanded the change, this did not relieve Robco of issuing the policy, printing it, etc., but Mitchell had Kenilworth pay the 20% producer's costs, hence, the 10% rather than the 30%.

order to establish "intent" to participate in the scheme, since that intent is a specific intent, that must be proven, *Durland v. United States*, 161 U.S. 306, 314 (1895).

The only evidence on this came out on cross-examination of petitioner as follows:

> "Q. Now, you were aware that the money being paid to Judy Gibbs (defendant's wife) would come from the Robco accounts? A. Yes. Q. Did you ever investigate the Robco accounts to ensure that the money that was being paid was not premium money? A. No. Q. Did you ever inquire as to Mr. Patterson about that? A. I assume Mr. Patterson was familiar with those . . . rules and regulations and so was Mr. Mitchell, and I am their partner. Q. Isn't it true that you never looked at one document to ensure that Judith Gibbs was not receiving premium money that was properly owed to Kenilworth. . . ? A. I never looked at any documents at Robco." (R. 705)

While the Court of Appeals ignored the original oral finding of the trial court in favor of the new findings, after remand, when it became necessary to reject the above argument, it returned to the original and quoted:

> "The defense in this case is essentially a good faith defense. In light of all the circumstancial evidence but particularly in light of defendants' sophistication in the insurance business, that defense is not persuasive."

We raised no "good faith defense," we raised the fact that there was no knowledge, and without knowledge, it was impossible to form a wrongful "intent", *compare, United States v. Martin-Trigona*, 684 F.2d 485 (CA. 7, 1982), *with, Phillips v. United States*, 356 F.2d 297, 303 (1966).

What this evinces is a deliberate erosion of the presumption of innocence in favor of a philosophy that says if the government charges, the courts must sustain, Scott Turow, *Presumed Innocent* (Farrar, Straus, Girout 1987) (a novel). Witness the "flip-flop" of the trial court to sustain the government; the Court of Appeals resting its foundation on the Memorandum Opinion of May 28, 1988, yet, where to sustain the prosecution it becomes expedient to rely on the original so the prosecution could prevail, it did so.

We go a step further. While it is true that a federal mail fraud prosecution need not be based upon a state criminal charge, *Parr v. United States*, 363 U.S. 370 (1960), nevertheless, the government is usually required to prove " 'wrongdoing in . . . (the victims) property rights by a dishonest method or schemes' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching,' " *McNally v. United States*, 483 U.S. 359, 107 S.Ct. 2275, 2881 (1987), here we deal with a violation of the Illinois Insurance Code.

Hence, how that Code, on the same subject, has been interpreted, is the law that should be followed, *Durlan v. United States*, 356, 161 U.S. 306 (1985); *Parr v. United States*, 363 U.S. 370 (1960). Here there is a rejection of that principle, for the Illinois Supreme Court has held, under almost identical conditions, that Patterson's action was a mere "technical violation of the statute," *Dorfman v. Gerber*, 29 Ill.2d 191 (1963) not raised to criminal perspective, thus, reversing the holding of its own appellate court now adopted by the Federal courts.

Yet, it is symptomatic of the whole problem. Congress has rejected control of the insurance industry in favor of

state control. In our Federal system of government, this should come as no surprise. While there is no Federal common law crimes, *United States v. Goodwin & Hudson*, 7 Crunch. 32, 3 L.Ed. 259 (1812); Warren, *Some New Light On The Federal Judiciary Act Of 1789*, 37 Harv. L. Rev. 49, 73 (1923), one has just been created by the executive—Department of Justice. Since the courts no longer in their zealous guard for the Constitution stand at the individual's side as his champion against constitutional usurpation, but, now, rather, place themselves besides the executive to protect that branch of Government to the exclusion of all other, the very foundation of our tripartite Government disappears, and the Department of Justice become "big brother," with only this Court standing between all.

The upshot to this petitioner is that he has been convicted of a crime with a Record that has no evidence to establish an essential element of that crime, "intent" to participate, which should have voided his conviction, *Thompson v. Louisville*, 362 U.S. 199 (1960). In addition, petitioner is found guilty of a "scheme to deprive *Kenilworth and its policyholders of money*," (App. p. A-18; emphasis added), a charge never made, hence itself a constitutional deprivation, *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) but that too is rejected because of the perceived overweening need to sustain whatever the Department of Justice has wrought.

Only this Court can prevent the continuation of such a course.

CONCLUSION

For the reasons advanced, Petitioner prays that this Court issue its Writ of Certiorari to review the judgment entered in this cause by the United States Court of Appeals for the Seventh Circuit, and that upon a complete review, his conviction be reversed.

Respectfully submitted,

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